

4-1-2011

Why Do You Persecute Me? Proving The Nexus Requirement For Asylum

Christian Cameron

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Christian Cameron, *Why Do You Persecute Me? Proving The Nexus Requirement For Asylum*, 18 U. Miami Int'l & Comp. L. Rev. 233 (2014)

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WHY DO YOU PERSECUTE ME? PROVING THE NEXUS REQUIREMENT FOR ASYLUM

*Christian Cameron**

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I. INTRODUCTION

Luz Marina Silva, a political activist in Colombia, began to receive anonymous phone calls threatening to kill her if she did not stop her political activities. One day, an anonymous shooter attempted to take her life, narrowly missing her. More anonymous phone calls came after the shooting, saying they would not miss her next time. She feared she would be killed if she did not stop her political activities, and fled the country as a refugee and filed for asylum in the U.S.¹ The United States offers protection to refugees

* Christian Cameron is a third year law student at the University of Miami School of Law. I would like to thank Professor Rebecca Sharpless for her guidance in research and writing. I would also like to thank Judge Kenneth Hurewitz for his encouraging feedback on my initial draft.

fleeing persecution on account of political opinion, and it would seem that in many ways Silva was a good candidate for political asylum. However, her asylum application was denied, not because her story was not credible, but because she could not conclusively prove that the motives of the anonymous shooter were political. A number of cases have arisen in the U.S. circuit courts addressing similar scenarios, producing different approaches in the way these cases should be treated.

The 1951 Convention Relating to the Status of Refugees (Convention) defines refugees as persons fleeing their country because of persecution on account of race, religion, nationality, social group, or political opinion.² U.S. Asylum law is directly based off of the Convention, and adopts the same language.³ Applicants must be able to show a nexus between the persecution and one of these protected grounds in order to qualify as refugees (the nexus requirement). This inevitably requires that the applicant show the motivations of their persecutors. One problem, however, is that attackers rarely introduce themselves and explain their motives to their victims, particularly when the persecutors are private parties. In these cases, asylum applicants are forced to use circumstantial evidence to show that persecution was on account of a protected ground. When an applicant cannot definitively prove motivation, what should courts require by way of evidence?

The Eleventh and Third Circuits have a higher standard for proving the nexus requirement than the Ninth Circuit. Not knowing the identity of the attacker appears to be a nearly insurmountable problem for applicants in the Eleventh and Third Circuits, whereas applicants in the Ninth Circuit may still be able to establish the nexus requirement. Which approach is more faithful to U.S. asylum law and the 1951 Convention as amended by the 1967 Protocol (Protocol)? And what sources of law can inform this process? This article argues that the Ninth Circuit approach is more faithful to the intent of the

¹ *Silva v. Attorney General*, 448 F.3d 1229, 1234 (11th Cir. 2006).

² Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137 [hereinafter Convention].

³ Elizabeth A. James, *Comment: Is the U.S. Fulfilling Its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context*, 33 N.C.J. INT'L L. & COM. REG. 455, 476 (2008).

Immigration and Nationality Act and to the Convention. Even though the burden is on the applicant to prove her case, the burden of proof should not require the applicant to produce evidence that is impossible to obtain.

Just as important as the burden of proof is the standard of review on appeal, which greatly affects a judge's ability to decide a case. Whether the finding is characterized as an issue of fact or an issue of law determines how much deference will be accorded to the Immigration Judge's findings. Judges give great deference to findings of fact, yet review issues of law *de novo*. The majority of circuit courts, including the Eleventh Circuit, assume that an Immigration Judge's finding of the nexus requirement is an issue of fact, but this article argues that in some instances it is more appropriate to treat it as an issue of law, as some Ninth Circuit opinions illustrate. The Eleventh Circuit, by giving deference to "findings of fact" made by Immigration Judges, have in fact refused to address serious errors of law.

One must turn to the language of INA § 101(a)(42) to see what the appropriate standard is. However, since U.S. asylum law is based off of the Convention, international sources of law should also be taken into account. Furthermore, this article looks to the United Nations High Commissioner for Refugees (UNHCR) Handbook (Handbook)⁴ for guidance on how the Convention should be interpreted. The reading most consistent with the Convention, U.S. asylum law, and the Handbook is that an applicant should not be required to know the identity of an attacker in order to satisfy the nexus requirement. Before turning to this problem, however, a brief overview of the relevant Convention provisions and U.S. asylum law is necessary.

⁴ UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Jan. 1992) [Hereinafter *Handbook*], available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

II. BACKGROUND: CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES AND THE IMMIGRATION AND NATIONALITY ACT

The Convention defines a refugee as “any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”⁵ In 1968, the United States became party to the Convention as amended by the Protocol, and Congress made the Immigration and Nationality Act of 1980 (INA).⁶ INA § 101(a) defines a refugee as a person who is outside of such person’s country of nationality and cannot return “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”⁷ The difference between the definition of refugee in INA § 101(a) and the Convention is that Congress added past persecution as a basis for being a refugee, whereas the Convention only speaks of a “well founded fear” of persecution.⁸ Under the convention, past persecution would be relevant personal experience tending to establish a well-founded fear of persecution as well,⁹ but U.S. Asylum law specifically states that “An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.”¹⁰

This definition raises several questions concerning who qualifies for refugee status. One important question is what constitutes persecution. Courts have distinguished “mere harassment” from persecution:

⁵ Convention, *supra* note 2, art. 1.

⁶ Pub. L. No. 96-212, 94 Stat. 102; *see also Matter of Acosta*, 19 I&N Dec. 211 (B.I.A. 1985) (“[W]e note that Congress added the elements in the definition of a refugee to our law by means of the Refugee Act of 1980 In so doing Congress intended to conform the Immigration and Nationality Act to the United Nations Protocol Relating to the Status of Refugees . . .”).

⁷ 8 U.S.C. § 1101(a)(42) (2006).

⁸ *See Mahsa Aliaskari, U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries*, 8 AM. U.J. GENDER SOC. POL’Y & L. 231, 234 n.11 (2000).

⁹ *Handbook, supra* note 4, para 41.

¹⁰ 8 C.F.R. 208.13(b)(1) (2010).

Although the INA does not expressly define “persecution” for purposes of qualifying as a “refugee,” *see* 8 U.S.C. § 1101(a)(42) . . . “persecution” is an “extreme concept,” requiring “more than a few isolated incidents of verbal harassment or intimidation,” and that “[m]ere harassment does not amount to persecution.”¹¹

For instance, threatening messages or phone calls, even death threats, normally do not rise to the level of persecution.¹² However, an alien need not experience persecution in order to qualify as a refugee. Even in the absence of past persecution, a person may be able to show a well-founded fear of future persecution if the fear is reasonable.¹³

The agents of persecution are also an important aspect of a claim to asylum. Normally persecution comes from the government, but in some instances persecution may come from the population itself: “Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”¹⁴ Where a nongovernmental actor is the agent of persecution, an applicant for asylum must also show that the situation is pervasive throughout the country, and relocating to another area in the same country would change the circumstances. If the government is the persecutor, it is presumed that the persecution is pervasive throughout the country.

¹¹ *Sepulveda v. United States Attorney General*, 401 F.3d 1226, 1231 (11th Cir. 2005) (citing *Gonzalez v. Reno*, 212 F.3d 1338, 1355 (11th Cir. 2000)); *see also Handbook, supra* n. 4, para 51-53.

¹² *See, e.g., Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) (“Threats standing alone . . . constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual suffering or harm.”); *see also Sepulveda*, 401 F.3d at 1231.

¹³ “These considerations need not necessarily be based on the applicant’s own personal experience. What for example, happened to his friend and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded.” *Handbook, supra* note 4, para. 42.

¹⁴ *Handbook, supra* note 4, para. 65.

The burden of proof has always laid with the alien seeking refugee status.¹⁵ In 2005, however, the Real ID Act added the following statutory provision:

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.¹⁶

Even though it was already understood that the burden of proof lay on the applicant, this provision explicitly states that the applicant must show that there is a nexus between the persecution and one of the five related grounds.

What if the victim does not know the specific identity of the individual persecutor? Is there any way to prove that there is a nexus between the persecution and one of the five protected grounds? Return to the scenario of Silva described at the beginning of this article regarding the anonymous shooter. There is no question that such an attack rises to the level of persecution. However, if it occurs without any other evidence to suggest that it was motivated by one of the five protected grounds, the applicant cannot prove that she falls within the definition of a refugee under the Convention. More proof would be needed to show that the persecution was because of one of the five protected grounds. But if there are, as in Silva's case, other incidents of discrimination motivated by one of the protected grounds, perhaps not in themselves amounting to persecution, but suggesting that the anonymous attack was also linked to that protected ground, can the applicant prove past persecution on

¹⁵ "Case law and the regulations have always made clear that it is the alien who bears the burden of proving that he would be subject to, or fears, persecution." *Matter of Acosta*, 19 I&N Dec. 211, 215 (B.I.A. 1985); see also *Handbook*, *supra* note 4, para. 197 ("It is a general legal principle that the burden of proof lies on the person submitting a claim.").

¹⁶ 8 U.S.C. 1158(b)(1)(B)(i) (2006).

account of political opinion? Or does the applicant have a well founded fear of future persecution? In addition to these facts, add a third factor: what if the immigrant comes from a country where there is civil war or where violence is a common occurrence? Does this help the applicant's case, or hurt it?

Although this scenario may seem like a very narrow set of facts, this situation is not uncommon in countries experiencing violent conflicts. The Eleventh and Third Circuits, for instance, have denied asylum claims like this one on review from the Board of Immigration Appeals (BIA). The Eleventh Circuit decisions, most notably in *Silva v. Attorney General*¹⁷ and *Sepulveda v. Attorney General*,¹⁸ suggest that in a country where violence is the norm, an asylum applicant has a heavier burden to show that the reason for the persecution was because of a protected ground. The Ninth Circuit in some cases, as in *Aguilera-Cota v. INS*,¹⁹ have taken a different approach, not requiring the applicant to prove definitively the reason for the persecution in order to satisfy the nexus requirement.

III. U.S. CIRCUIT COURTS DECISIONS: DIFFERENT APPROACHES

Two notable cases illustrate the Eleventh Circuit's approach to the scenario described above, namely, *Sepulveda v. Attorney General*²⁰ and *Silva v. Attorney General*.²¹ As both of these cases concern asylum applicants from Colombia, a brief background of the Colombian country conditions is helpful to understand the context of these cases. Luis Alberto Restrepo writes, "The majority of the Colombian population has become accustomed to viewing human rights violations as endemic occurrences or as natural disasters, as normal as landslides or earthquakes."²² In Colombia, most asylum applicants claim political persecution,²³ however, the government is

¹⁷ 448 F.3d 1229 (11th Cir. 2006).

¹⁸ 401 F.3d 1226 (11th Cir. 2005).

¹⁹ 914 F.2d 1375 (9th Cir. 1990).

²⁰ 401 F.3d 1226 (11th Cir. 2005).

²¹ 448 F.3d 1229 (11th Cir. 2006).

²² Luis Alberto Restrepo, *The Equivocal Dimensions of Human Rights in Colombia*, in *VIOLENCE IN COLOMBIA 1990-2000*, 96 (Charles Bergquist, Ricardo Peñaranda, Gonzalo Sánchez G., eds., 2001).

²³ 448 F.3d at 1235.

not always the persecutor. Various guerrilla groups, such as the Armed Revolutionary Forces of Columbia (FARC), or the National Liberation Army (ELN), use brutal methods to achieve their political goals.²⁴ U.S. courts have found that these guerilla groups are so pervasive throughout Colombia, that internal relocation is not considered a viable option for those fleeing persecution from them.²⁵ According to the Colombia Profile of Asylum Claims and Country Conditions, asylum applicants in Colombia often "express uncertainty about the identity and/or motivation of their alleged abusers."²⁶ These circumstances have created some problems for asylum applicants from Colombia and other countries where such violence is common.

In *Sepulveda v. Attorney General*, the asylum applicant believed that she was a target of persecution because "her pro-democracy ideology conflicts with that of the ELN guerilla group."²⁷ Sepulveda belonged to a University group that organized peace marches and also helped negotiations between the families of people who had been kidnapped and the kidnappers. The method that the group used to communicate was through mailboxes that the group set up at several restaurants, at one of which Sepulveda worked.²⁸ After she started helping with the negotiations, she began receiving threatening phone calls from members of the ELN. The callers explicitly told her to stop her peace activities and threatened to kill her.²⁹ After she finished one of her shifts at the restaurant, a bomb was placed in the mailbox set up by the University group. Although she did not know the identity of the person who placed the bomb there, she believed it was one of the ELN members because of the phone calls and her involvement in the negotiations.³⁰

²⁵ 401 F.3d at 1232, n. 7. ("The 1999 and 2000 Country Reports . . . make clear that guerillas exercise influence throughout Colombia, and that small and large municipalities are already overwhelmed by the huge populations of displaced persons, who are consequently without access to health care, education, or employment.")

²⁶ *Id.*

²⁷ *Id.* at 1229.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

With regard to the bombing, the court noted that “[a]lthough the evidence may permit a conclusion the restaurant bombing was directed at Sepulveda on account of her political activity, it does not compel such a conclusion.”³¹ The threatening phone calls, while the court agreed they were directed at her on account of her political opinion, did not rise to the level of persecution.³² The court considered each incident individually, yet did not seem to take into account the larger picture and consider all the facts taken together in determining whether the nexus requirement was satisfied. It seems more likely than not that the bomb, which was placed in the mailbox set up by the University group specifically for the negotiations, was directed against the University group, especially when this incident is considered in light of the death threats from ELN members.

Perhaps an even more compelling case was that of Luz Marina Silva, which was heard on appeal the next year by the Eleventh Circuit in *Silva v. Attorney General*.³³ Silva belonged to a politically active family with connections to the conservative party, and she “participated in ‘health brigades’ or ‘help brigades,’ which were groups of people that traveled into neighborhoods and offered the residents of those neighborhoods health services to encourage the support of the Visionary Party.” During the second campaign, Silva received a death threat in the form of a “condolence note” signed by the Revolutionary Armed Forces (FARC) in September of 1999, stating “Luz Marina Silva Rest in peace for doing what she shouldn’t be doing in the wrong place.” After this incident she began to receive anonymous threatening phone calls.³⁴ Three weeks after receiving the death threat signed by the FARC, two unidentified men on motorcycles followed her home and shot at her. Although she was uninjured, she stated that the shots missed her “by very little,” and the back window of her car was shattered.³⁵ She received another anonymous call that night warning her not to report the incident. She

³¹ *Id.*

³² *Id.* at 1231.

³³ 448 F.3d 1229 (11th Cir. 2006).

³⁴ *Id.* at 1234. One phone call stated that Silva “was a target because her family ‘had always exploited the Colombian people.’” However, the majority found it significant that “Silva did not testify that any of the calls mentioned her politics.” *Id.*

³⁵ *Id.* at 1245-46, (Carnes, J., dissenting).

stopped all political activities after this incident, and did not receive any more anonymous threats. She left for the United States one month later, and thinking it would be safe to return, she came back to Colombia in January of 200, where she began to receive more anonymous threatening phone calls, stating "we are not going to miss a second time, we're going to kill you."³⁶ She came to the United States two months later, and filed for asylum.

The Immigration Judge denied her claim for asylum, stating that "everybody in Colombia suffers under these general conditions of violence and criminal activity," and the BIA affirmed.³⁷ The Eleventh Circuit, in an opinion written by Judge Pryor, affirmed the BIA.

As in *Sepulveda*, the Eleventh Circuit Court seemed to take apart the evidence piece-meal. The threatening phone calls were not on account of a political activity because they were anonymous, even though the calls were directed at her participation in the "health brigades." The court admitted that the first "condolence note" signed by the FARC was on account of her political activity, but it did not rise to the level of persecution.³⁸ The shooting, on the other hand, while sufficient to rise to the level of persecution, was not proved to be on account of political opinion. Judge Pryor, writing for the majority, stated,

the shooting incident, for which Silva had no explanation, did not distinguish her from the majority of Colombians who are also subject to the general conditions of violence and criminal activity in Colombia. Both the Colombian Country Report and the Country Profile are replete with descriptions of widespread and indiscriminate violence."³⁹

Although the court admitted that a different conclusion could be reached if it were reviewing the case *de novo*, the court stressed that that it must review the Immigration Judge's findings of fact under the

³⁶ *Id.* at 1234.

³⁷ *Id.* at 1235.

³⁸ *Id.* at 1237.

³⁹ *Id.* at 1238.

highly deferential “substantial evidence test.”⁴⁰ Under this test, a finding of fact cannot be reversed unless the evidence compels such a conclusion. The court concluded by stating that “when we view the evidence in the light most favorable to the finding of the Immigration Judge, the record does not compel the conclusion that Silva suffered political persecution.”⁴¹ The court assumes that an Immigration Judge’s finding that the nexus requirement has not been satisfied is a finding of fact rather than a finding of law.

Judge Carnes in his dissent argued that the evidence was compelling that the shooting was connected to the FARC, since the FARC had just three weeks earlier threatened to kill her in the “condolence note,” and she had continued her political activities.⁴² The anonymous phone calls, Judge Carnes’ argued, did mention her political activity because they told her to stop her participation in the “health brigades,” and they clearly referenced the shootings, creating a very strong inference that FARC was behind all of the incidents. Carnes’ most stinging critique of the majority concerned its emphasis on the fact that Silva did not know the identity of the shooters:

True enough, the would-be assassins did not stop to introduce themselves. They rarely do. It is not realistic to expect the targets of political assassinations to know the identity of the gunmen who shoot at them. Only in the majority’s imagination do would be killers wear name tags or drive around on motorcycles with vanity plates displaying the name of their terrorist organization.⁴³

Judge Carnes in his dissent also took a different view concerning how general conditions of violence should affect an applicant’s burden of proof:

“[T]he widespread nature of violence in a country is not a legitimate reason for denying asylum to a prac-

⁴⁰ *Id.* at 1236.

⁴¹ *Id.* at 1239.

⁴² *Id.* at 1246 (Carnes, J., dissenting).

⁴³ *Id.* (Carnes, J., dissenting).

tioner who establishes that she has been persecuted within the meaning of 101(a)(42)(A) of the Immigration and Nationality Act The fact that there is also indiscriminate violence is no reason for refusing to recognize violence and persecution on grounds that are specifically listed in our immigration laws.⁴⁴

Judge Carnes did not argue that there was any error of law, which would have caused the court to review the case under a less deferential standard. In the dissenting opinion's view, although there was no irrefutable proof that the gunmen were from FARC, the inference was so compelling, as a matter of fact, that the BIA's decision should have been reversed.

The Third Circuit used a similar approach as the Eleventh Circuit in *Skendaj v. Attorney General*.⁴⁵ Skendaj and his family received anonymous threatening phone calls, which, according to his wife, were "on account of the political opinion of her father, a high ranking member of the Albanian Democratic Party."⁴⁶ The court in *Skendaj* found that the anonymous telephone calls, although on account of political opinion, did not rise to the level of persecution.⁴⁷ However, when the Skendaj family went in a taxicab to visit the father who was part of the Albanian Democratic Party, two unidentified men on motorcycles attempted to kidnap their child through the window, although the taxicab driver sped up to avoid them.⁴⁸

The court found that the attempted kidnapping was not persecution on account of a protected ground. As in *Silva*, the court in *Skendaj* found it significant that the men on motorcycles were anonymous: "Neither Skendaj nor his wife were able to identify the kidnappers, the kidnappers did not make any reference to the Skendajs' political opinion, the Skendajs did not report the incident to

⁴⁴ *Id.* at 1248 (Carnes, J., Dissenting).

⁴⁵ No. 08-2928, 2009 U.S. App. LEXIS 19760 (3d Cir. Sep. 1, 2009).

⁴⁶ *Id.* at *750.

⁴⁷ *Id.*

⁴⁸ *Id.*

the police, and they did not experience further threats or confrontations.”⁴⁹

Although a reasonable inference could be made that the telephone calls and the attempted kidnapping were related, the court considered the evidence insufficient to establish past persecution. It seems strange to require the Skandajs to know the identity of the kidnappers, since for obvious reasons kidnappers prefer to remain anonymous. It is difficult to imagine how the kidnappers could have referenced the Skandajs’ political opinion, considering they did not even have time to complete the kidnapping.

In contrast, the Ninth Circuit took a different approach in *Garces v. Mukasey*⁵⁰ in another case involving a Colombian Refugee. Garces was involved in FUNDAEMPAZ, an organization in Colombia that opposed the human rights abuses of the ELN, and began receiving threatening telephone calls in October of 2001. Four months later, an unidentified person fired shots at Garces’ home, but she was on vacation.⁵¹ The next month, an unidentified woman in a taxicab, accompanied by a man, pulled up to Garces’ home while she was sitting on the balcony and pointed a gun at her. The cab drove away after Garces ran back into the house.⁵²

The Immigration Judge denied the asylum application “because the death threats Garces received were via telephone and not acted upon.”⁵³ The Ninth Circuit reversed. The threatening phone calls alone did not rise to the level of persecution, but the court held that the incidents involving the shooting of her house and the pointing of the gun were “close confrontations” sufficient to “compel

⁴⁹ *Id.*

⁵⁰ No. 04-70272, 2009 U.S. App. LEXIS 4842 (9th Cir. Feb. 11, 2009).

⁵¹ The Court noted the testimony of Garces, who said that she did not conclusively know who the shooter was, but stated “we had been living at that house for 15 years and that kind of thing had never happened before, so we felt that it was totally related to the threats we had received.” *Id.* at **8.

⁵² *Id.* at **1-2.

⁵³ *Id.* at **4-5 (“The second incident which the respondent described in which she was seated on the balcony, the assailant never took any action against the respondent. They simply point[ed] what she thought was a weapon and moved on. They never took any follow-up actions with regard to the threat.”).

a finding of political persecution within the meaning of the asylum statute.”⁵⁴ The court noted:

Although the government asserts that there is no evidence to link ELN's death threats to the incident where the family home was shot and where the female assailant pointed a handgun at Garces, we find that there is a reasonable inference that these incidents are related given their temporal proximity. A conclusion that these incidents are coincidental or unrelated is an unreasonable reading of the record.⁵⁵

The court's statement illustrates its view that it is unnecessary to know the identity of the attacker in order to satisfy the nexus requirement. The court concluded that the record “conclusively establishes . . . that ELN targeted petitioners because of Garces's membership in FUNDAEMPAZ.”⁵⁶ The court found that Garces in fact had suffered past persecution, and remanded to the BIA the issue of whether she had a well founded fear.

The Ninth Circuit similarly ruled on a case involving a Salvadorian refugee in *Aguilera-Cota v. U.S. Immigration and Naturalization Serv.*⁵⁷ In this case, Aguilera, a government employee received an anonymous threatening note with his name on it,

⁵⁴ *Id.* at **11.

⁵⁵ *Id.* The Court stated that “The government does not contest that these incidents were . . . politically motivated.” *Id.* at **4, n.3. The government in its brief noted that the immigration Judge ruled that the applicant did not meet her burden of proof to show that a separate incident, where she was drugged and abducted in a taxi cab, was politically motivated, but the government did not make any similar argument concerning the shooting at the house or the pointing of the gun. Brief for Respondent at 17, *Garces*, 2009 U.S. App. LEXIS 19760 (No. 04-70272), 2004 WL 3155049 at *17. There seems to have been some confusion of the issues, therefore, when the court stated that the government asserted that there was “no evidence to link ELN's death threats to the incident where the family home was shot and where the female assailant pointed a handgun.” *Garces*, 2009 U.S. App. LEXIS 4842, at **11. Nevertheless, the court's statement illustrates its view that it would be unreasonable to disregard the circumstantial evidence indicating that the anonymous attackers were members of ELN, and thus politically motivated.

⁵⁶ *Garces*, 2009 U.S. App. LEXIS 19760, at **11.

⁵⁷ 914 F.2d 1375 (9th Cir. 1990).

warning him to “quit his job or pay the consequences.”⁵⁸ Shortly after receiving the note, which Aguilera destroyed, an unidentified man came to Aguilera’s home and “questioned his sister concerning Aguilera’s whereabouts and his job with the government,” and stated that he would return.⁵⁹ Aguilera fled to the United States and applied for asylum, but the Immigration Judge denied his application. The Ninth Circuit, in an opinion by Judge Reinhardt, reversed, holding that it was not necessary to know the identity of the person who wrote the note or came to his house in order to satisfy the nexus requirement:

There is nothing novel about the concept that persecutors cannot be expected to conform to arbitrary evidentiary rules established by the Immigration and Naturalization Service; neither Salvadoran leftists nor Middle Eastern terrorists, such as members of the PLO or the Hezbollah, have been given adequate notice that our government expects them to sign their names and reveal their individual identities when they deliver threatening messages.⁶⁰

Interestingly, the court characterized the lower court’s error as an error of law, rather than an error of fact. In the court’s opinion, the Immigration Judge used an improper and too stringent standard in assessing Aguilera’s testimony to determine whether the nexus requirement had been satisfied.⁶¹ This means that the court did not use the “compelling evidence test,” but reviewed the finding of the lower court under *de novo* review, which is less deferential.

U.S. circuit courts are split on how to approach these situations. It seems for some courts that not knowing the identity of an attacker is an insurmountable problem, as there is no way for them to definitively prove the motives of their attackers. Other courts, like the Ninth Circuit, take all of the evidence together in determining whether the nexus requirement is satisfied, even if the

⁵⁸ *Id.* at 1378.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1380.

⁶¹ *Id.*

identity of the attacker is not known. Furthermore, the fact that courts may be operating under different standards of review for similar findings of the immigration judge, which may restrict the courts' analysis in different ways, complicates matters further. Which is the right approach? Fortunately, there are other sources of interpretation that may be considered. As U.S. Asylum law is based on the Convention, international sources may prove particularly instructive.

IV. PROVING THE NEXUS REQUIREMENT: INTERPRETING U.S. ASYLUM LAW IN AN INTERNATIONAL CONTEXT

A. *International Sources of Interpretation*

When interpreting U.S. Asylum law, one cannot ignore the international context in which it arose. The language used to define a refugee under INA § 101(a)(42), with some additions and small changes, comes directly from the language of the 1951 Convention. Elizabeth A. James writes, "U.S. Asylum Law is derived from the 1951 Convention, the substantive provisions of which were included in the 1967 Protocol Relating to the Status of Refugees. After becoming a party to the Protocol in 1968, the United States became bound by the doctrines concerning protection of refugees"⁶²

Carly Marcs notes that "[i]n addition to interpretation of the convention proper, there is increasing recognition that a thorough analysis and application of the Convention must also take into account the U.N. High Commission for Refugees Handbook and guidelines" (Handbook).⁶³ The Supreme Court in *Ins v. Cardoza-Fonseca* cited the Handbook for guidance on how the burden of proof should be interpreted, stating that while the Handbook does not have force of law, "[n]onetheless, the Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes."⁶⁴

⁶² James, *supra* note 3, at 476 (citations omitted).

⁶³ Carly Marcs, *Spoiling Movi's River: Towards Recognition of Persecutory Environmental Harm Within the Meaning of the Refugee Convention*, 24 AM. U. INT'L L. REV. 31, 40 (2008).

⁶⁴ 480 U.S. 421, 439 n. 22. (1987).

Furthermore, case law from other countries that are also party to the Convention may shed light on how others have interpreted similar laws. As with the Handbook, these sources are not binding, but where there is no consensus among U.S. courts, one may look to international sources as persuasive sources of interpretation.

B. General Conditions of Violence: A Positive or Negative Factor?

How do “general conditions of violence and criminal activity” factor into the assessment of an applicant’s burden of proof? According to the Handbook, “persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol.”⁶⁵ What this means for civil war victims has been interpreted differently in different countries, but it is generally agreed that civil war crimes are a special case.⁶⁶ However, in the cases discussed above, none of the applicants claimed that they were victims of general violence. In these cases the applicants properly alleged that persecution was on account of a protected ground. But what effect do “general conditions of violence” in the country have on the applicant’s burden of proof? Should this fact make it harder for applicants, or should it make it easier?

The court in *Silva* found it significant that the “Colombian Country Report and the Country Profile are replete with descriptions of widespread and indiscriminate violence” and that “Colombians routinely suffer similar incidents of terroristic threats and violence,” and that therefore her situation was not sufficiently distinct to set her apart for refugee status.⁶⁷ The reasoning behind this view seems to be that if there is much “indiscriminate violence” in a country, the greater the chances that any specific act of persecution is not on account of one of the grounds protected under the Convention.⁶⁸ This

⁶⁵ *Handbook*, *supra* note 4, para. 164.

⁶⁶ See generally Hugo Storey and Rebecca Wallace, *Note and Comment: War and Peace in Refugee Law Jurisprudence*, 95 A.J.I.L. 349, 349 (2001).

⁶⁷ 448 F.3d at 1238.

⁶⁸ *Id.* at 1242. (“[I]f four out of every ten murders are on account of a protected ground, six out often are not. The majority of the violence in Colombia is not related to protected activity. When an individual seeking asylum based on persecution does

view suggests that if the country conditions were more peaceful, and such acts of violence were less common, it would be easier for an applicant to prove that the persecution was on account of one of the protected grounds.

Does it make sense to require a higher burden of proof from applicants who come from countries where violence is common? When there are general conditions of violence in a country, it may be difficult for victims to identify who is behind particular acts of persecution. In 1999, a New Zealand court heard the case of a man seeking refugee status from the civil war-torn Sri Lanka, where abuses are committed in such countries not just by the state,

but also by other groups and individuals who may have no connection with either the state or any of the warring factions. Very often the reasons for the commission of the human rights abuses will be mixed. As far as the victims, or potential victims of the abuses are concerned, the identity of the agent of persecution and the reasons for the persecution matter little.⁶⁹

But the reasons for persecution matter very much for the purposes of asylum law. Nevertheless, in the context of cases like *Silva*, *Sepulveda*, *Aguilera-Cota*, and others, it is unreasonable to require the applicant to conclusively prove what the reason for the persecution was, especially where it is impossible for the applicant to do so. If the evidence creates a strong inference that the persecution was on account of a protected ground, but it is impossible for the applicant to prove this conclusively, the nexus requirement should be satisfied. The Handbook notes,

The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of

not know either the identity of the alleged persecutors or the reason for the persecution, the prevalence of random violent activity in Colombia, totally unrelated to any protected ground, allows a reasonable inference that the individual seeking asylum is the victim, not of political persecution, but of random violence.”).

⁶⁹ Refugee Appeal No 71462/99, para 30, quoted in Story & Wallace, *supra* note 66.

origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin while not a primary objective is an important element in assessing the applicant's credibility.⁷⁰

These comments address the issue of credibility, an issue not in dispute in *Silva*, *Sepulveda*, and *Garces*. The Handbook suggests that just because the conditions of the alien's country of origin may not seem intolerable, the alien should not be precluded from establishing that her fear is well founded.⁷¹

Silva had the opposite problem as the one addressed in the Handbook. The country conditions presented no issue of credibility, since her testimony was consistent with the country conditions. Her problem is essentially that her experiences were *too* consistent with the country conditions, making it harder for her to prove that she was singled out on account of her political opinion. However, such use of country conditions was never contemplated by the Convention or the Handbook. Although the Handbook does indeed stress that violent country conditions is not necessarily enough to prove persecution on a protected ground,⁷² nowhere does it suggest that violent conditions should in any way make it harder for an applicant to prove the nexus requirement. Violent country conditions should not be used against the applicant, as it was in *Silva*, but should on the contrary serve only to bolster the applicant's credibility, and support her contention that her fear is well-founded. In contrast to the approach taken by the Eleventh and Third Circuits, the Handbook suggests that such general conditions of violence actually work in the applicant's favor in determining a well-founded fear, making fear of persecution more reasonable as far as the applicant is concerned.

⁷⁰ *Handbook*, *supra* note 4, para. 42.

⁷¹ *Id.*

⁷² *Id.* para. 164.

C. *Well-Founded Fear: Country Conditions and Its Effect on the Subjective State of Mind*

Even if it is impossible for an applicant to prove definitively past persecution based on one of the five grounds, can the applicant show a well-founded fear of future persecution?⁷³ As the BIA articulated in *Matter of Mogharrabi*, “an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution.”⁷⁴ The Supreme Court in *INS v. Cardoza-Fonseca* stated that this standard does not require a showing that the applicant would more likely than not be persecuted, noting that the burden of proof for asylum is more generous than the standard for withholding of removal.⁷⁵

The Handbook analyses the phrase “well-founded fear” in terms of a subjective and an objective components: “fear” is the subjective state of mind, to which the phrase “well-founded” adds an objective element.⁷⁶ The Handbook states, “Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his country of origin.”⁷⁷

In defining the term “persecution,” the Handbook explains how the subjective state of mind can be affected by a country’s conditions:

“[A]n applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases

⁷³ For purposes of the Convention, past persecution is simply a relevant factor tending to establish a well-founded fear. *Id.* para 41. Under U.S. asylum law, an applicant may be granted asylum under INA § 101(a) for either past persecution or a well-founded fear of persecution. 8 C.F.R. 208.13(b)(1) (2010)

⁷⁴ *Matter of Mogharrabi*, 19 I. & N. 439 (B.I.A. 1987).

⁷⁵ 480 U.S. 421 (1987).

⁷⁶ *Handbook*, *supra* note 4, para. 38.

⁷⁷ *Id.* para. 37; *see also id.* para. 52 (“The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed.”).

combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds'."⁷⁸

Although the Handbook is not binding on U.S. courts, some jurisdictions recognize persecution on "cumulative grounds." The Ninth Circuit granted such an asylum application in *Krotova v. Gonzalez*, stating that "[w]e need not decide whether any one of those [instances of discrimination], rises to the level of persecution, because their cumulative effect persuades us that a finding of past persecution is compelled."⁷⁹ The Third Circuit, however, declined to address this issue in *Toen Lik Tan v. AG of the United States* when the applicant claimed that the Immigration Judge failed to consider the "cumulative harm" theory set forth in the Handbook, holding that "[t]he UNHCR Handbook . . . 'is not binding on the INS or American courts,'" and thus there was no legal issue.⁸⁰ Whether the "cumulative harm theory" is accepted or not, however, according to the Handbook, a "general atmosphere of insecurity in the country of origin" works in the favor of the applicant, making it more reasonable for an applicant to fear persecution.

In cases such as *Silva*, *Sepulveda*, *Skendaj*, *Aguilera-Cota*, and the others outlined above, the problem is not that they have not experienced anything that rises to the level of persecution, but that the only event that does rise to the level of persecution (e.g., shooting, bombing, kidnapping attempt, etc.) cannot conclusively be linked with all the other acts of discrimination which are on account of a protected ground. However, considering all of the facts together, the

⁷⁸ *Id.* para. 53.

⁷⁹ 416 F.3d 1080, 1085 (9th Cir. 2005); see also *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) ("The key question is whether, looking at the cumulative effect of all the incidents Petitioner has suffered, the treatment she received rises to the level of persecution.").

⁸⁰ 2007 U.S. App. LEXIS 7865, **8 (3d Cir. Apr. 5, 2007) (citing *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001)).

aggregate effect of the evidence raises a strong inference of past persecution on a protected ground. Even if this cannot be proved as past persecution on a protected ground, it certainly will “produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution.”⁸¹ Judge Carnes in his dissent in *Silva* stated,

[T]he majority opinion is willing only to assume that being shot at is persecution. I would be so bold as to hold that it is, especially when the attempted murder is preceded by a written threat to kill the victim because of her political activities and by an almost daily barrage of threatening phone calls at her home and restaurant.⁸²

In cases like *Silva* and *Sepulveda*, it is unreasonable to require proof that is impossible for the applicant to produce, where there is such a strong inference that the applicant will be persecuted on the basis of a protected ground.

It must be remembered that “past persecution” is not required in order to prove the nexus requirement, but a “well-founded fear” of persecution. Congress added the provision concerning past persecution to make it easier for those applicants who have already experienced persecution: such past persecution merely creates a presumption of a well-founded fear.⁸³ But one must not lose sight of the fact that a well-founded fear is all that is required. It appears, in the cases discussed above, that the immigration judges lost sight of the actual requirement, and denied the claims because the applicants could not prove past persecution on account of a protected ground definitively. Regardless of whether these findings are correct, the events that transpired in *Silva*, *Sepulveda*, and *Skedaj* would have created a well-founded fear in the applicants of persecution on account of political opinion.

⁸¹ *Handbook*, *supra* note 4, para. 53.

⁸² 448 F.3d 1229, 1246 (Carnes, J., dissenting).

⁸³ 8 C.F.R. 208.13(b)(1) (2010); see also Aliaskari, *supra* note 8.

D. The Burden of Proof: Circumstantial Evidence and "The Benefit of the Doubt"

An applicant's ability to show the nexus requirement is heavily dependent on the burden of proof. Under U.S. Asylum law, "[t]he burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A)."⁸⁴ This principle is consistent with the Convention, as the Handbook similarly states that "[i]t is a general legal principle that the burden of proof lies in the person submitting the claim."⁸⁵ However, the Handbook further explains what is meant by this burden of proof, stating that "while the burden of proof rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner."⁸⁶ Furthermore, the Handbook states that "it is hardly possible for a refugee to 'prove' every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt."⁸⁷ The Handbook requires a finder of fact to draw an inference in favor of the applicant in some cases where the applicant cannot definitely prove the case, assuming the applicant is found to be credible.⁸⁸

The U.S. Supreme Court articulated a similar standard in *INS v. Elias-Zacarias*.⁸⁹ In that case, the applicant claimed political persecution because a guerilla group tried to coerce him into joining their armed forces. The Court stated,

Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes

⁸⁴ 8 U.S.C. 1158(b)(1)(B)(i) (2006).

⁸⁵ *Handbook*, *supra* note 4, para. 195.

⁸⁶ *Id.* para. 196.

⁸⁷ *Id.* para. 203; *see also id.* para. 197 ("The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.").

⁸⁸ *Id.* para. 204.

⁸⁹ 502 U.S. 478 (1992).

motive critical, he must provide *some* evidence of it, direct or circumstantial. And if he seeks to obtain judicial reversal of the BIA's determination, he must show that the evidence he presented was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution.⁹⁰

Although the asylum application was denied, the Court did allow for the fact that asylum applicants may not be able to know the true motives of their persecutors, and that circumstantial evidence may be sufficient.

Silva most likely falls within that category of cases contemplated by the Handbook, where although the applicant cannot prove every part of her case, the fact finder should make an inference in her favor. The Handbook's interpretation of the phrase "on account of" one of the five protected grounds is particularly instructive: "Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail."⁹¹ One of the reasons why the Majority in *Silva* affirmed the denial of asylum was that her testimony did not explicitly connect the shooting and the anonymous phone calls with the "condolence note," although her application for asylum did.⁹² However, since it is the court's duty to analyze the specific reasons for the incidents in detail, since both *Silva*'s testimony and her application were found to be credible, the court should have arrived at this conclusion itself. *Silva* had the burden to produce the evidence, but the court has a duty to analyze it properly.

The Ninth Circuit in *Karouni v. Gonzalez* stated, "'asylum applicants [do not] bear . . . the unreasonable burden of establishing the exact motives of their persecutors . . . '[A] persecutor's identity

⁹⁰ *Id.* at 483-84.

⁹¹ *Handbook*, *supra* note 4, para. 66.

⁹² "Silva . . . wrote allegations in her application for asylum that, without more, supported her inference of persecution on account of her political opinion, but when Silva later testified credibly and in greater detail about those facts, at her asylum hearing, she provided ample grounds for finding that she had not suffered persecution based on her political opinion." 448 F.3d at 1240.

and/or motivation may be established by direct or circumstantial evidence.”⁹³ Silva had much circumstantial evidence raising a strong inference that the shooting was on account of political opinion. Although she had no direct evidence, this should not have been required under the standard articulated in *Elias-Zacarias*. It appears that the immigration judge in *Silva* was not following the standard articulated in the Handbook and confirmed in *Elias-Zacarias*, which does not require definitive proof of an attackers motive in order to satisfy the nexus requirement.

Whether or not the immigration judges followed this standard, the situation is complicated on appeal, however, where courts must give deference to the Immigration Judge’s findings of fact. The majority in *Silva* stated that “[w]e are required to view all of this evidence in the light most favorable to the finding of the Immigration Judge . . . and in that light, we cannot say that the shooting was indisputably related to Silva’s political activity.”⁹⁴ But is a finding of whether persecution was on account of a protected ground purely an issue of fact, or are there legal issues involved as well? The following section discusses whether there may be a better way to review an Immigration Judge’s determination of the nexus requirement.

E. “On Account of” Political Opinion: Issue of Law or Issue of Fact?

When an Immigration Judge wrongly decides a case based on an incorrect determination of the nexus requirement, there are two ways to reverse the judgment. First, it may reverse and find that the lower court’s determination of the “on account of” nexus is erroneous as a matter of fact, using the “substantial evidence test.” Under this highly deferential test, the circuit court cannot revise a finding of fact unless the record compels a reversal: “the mere fact that the record may support a contrary conclusion is not enough to justify a reversal

⁹³ 399 F.3d 1163 (9th Cir. 2005). In this case, the applicant was a homosexual from Lebanon, whose homosexual cousin was shot in the anus and killed by Hizballah. *Id.* at 1167-68. The immigration Judge denied the application because the applicant could not conclusively prove the motives of the murderers. *Id.* at 1169. The Ninth reversed and held that did have a well founded fear of persecution because of membership in a particular social group because shooting the victim in the anus was an “obvious sign” of the persecutors’ motive. *Id.* at 1174.

⁹⁴ 448 F.3d 1229, 1238 (11th Cir. 2006).

of the administrative findings.”⁹⁵ Second, a reviewing court may conclude that the evidence produced by an asylum applicant was so compelling that the lower court must have applied the wrong test in denying the claim, and erred as a matter of law. Issues of law are reviewed *de novo*, a standard that does not give any deference to the lower court’s findings. The standard of review under which these cases operates critically affects the analyses.

The Supreme Court assumed in *Elias-Zacarias* that a review of a BIA’s determination of the nexus requirement was an issue of fact that could only be overturned by compelling evidence.⁹⁶ The Eleventh Circuit in *Silva* stated a similar view. Consequently, the court reviewed the Immigration Judge’s determination under the highly deferential “substantial evidence test”:

[A]lthough the timing of the shooting would allow an inference that it was related to the “condolence note,” the record does not compel that conclusion We are required to view all of this evidence in the light most favorable to the findings of the Immigration Judge, . . . and in that light, we cannot say the shooting was indisputably related to Silva’s political activity.⁹⁷

A survey of other cases reveals that courts often consider this issue as one of fact. The First Circuit stated in *Hincapie v. Attorney General* that “the question of whether persecution is on account of one of the five statutorily protected grounds is fact-specific. Consequently, we review the BIA’s answer to that question through the prism of the substantial evidence rule.”⁹⁸ Even the Ninth Circuit stated in *Jahed v. INS*, “Whether persecution is ‘on account of’ a petitioner’s political

⁹⁵ *Silva v. Attorney General*, 448 F.3d 1229, 1236 (11th Cir. 2006) (citing *Adefemi v. Ashcroft*, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 1035 (2005)).

⁹⁶ 502 U.S. 478, 483-84 (1992).

⁹⁷ 448 F.3d at 1238 (citations omitted).

⁹⁸ 494 F.3d 213, 218 (1st Cir. 2007).

opinion is a question of fact; it turns on evidence about the persecutor's motives."⁹⁹

However, is there a legal issue here as well? Does a determination of whether persecution is on account of a protected ground involve an interpretation of law in addition to an interpretation of fact? Factually, either a persecutor was or was not politically motivated, therefore it makes sense to classify this issue as an issue of fact. But the issue in these cases can also be framed thus: what do courts require of an applicant to show that persecution is on account of a protected grounds? Specifically, what is the legal standard that courts should apply in determining whether an applicant has met its burden in showing that persecution was politically motivated? If the issue is framed this way, then there is a legal issue which courts should review *de novo*. In some cases, it may be more appropriate to review a finding of the nexus requirement this way. Several cases illustrate that this issue can be treated as a matter of law in some cases.

If a court applies an incorrect test in determining whether persecution was on account of a protected class, such error is an error of law. Although the Ninth Circuit treated a determination of the nexus requirement as an issue of fact in *Jahed*, the same court in *Aguilera-Cota* treated it as an issue of law.¹⁰⁰ In *Aguilera-Cota*, as noted above, the immigration Judge found that the applicant had not met his burden to show a well founded fear of persecution "on account of" his political opinion, because he did not know the identity of the person who wrote the threatening note or came to his house.¹⁰¹ The Ninth Circuit characterized this determination as an issue of law:

The second significant legal error was the use by the BIA and the IJ of an improper standard in evaluating Aguilera's testimony. As a result, they failed to give the proper weight to testimony essential to his case. A review of the IJ's decision reveals that in assessing whether Aguilera met the objective component of the

⁹⁹ 356 F.3d 991, 1003 (9th Cir. 2004).

¹⁰⁰ 914 F.2d at 1380. Judge Trott, who wrote the opinion in *Jahed*, joined the majority opinion in *Aguilera-Cota*.

¹⁰¹ *Id.*

well-founded fear test, the IJ imposed a far more stringent burden on petitioner than we deemed permissible in *Cardoza-Fonseca* and *Bolanos-Hernandez*. This error materially affected the outcome of the proceedings.¹⁰²

The court could have reversed by finding that the evidence as a matter of fact compelled a reversal, but instead the court made a point of noting that “[q]uestions of law, such as whether the BIA applied the appropriate legal standard, are reviewed *de novo*.”¹⁰³

Similarly, *Manghesha v. Gonzalez*, the Fourth Circuit reversed an Immigration Judge’s ruling that Manghesha, an Ethiopian asylum applicant did not qualify as a refugee because the persecution was not on account of a protected ground.¹⁰⁴ Manghesha worked for the government security services and was supposed to “spy on meetings of groups opposed to the government,”¹⁰⁵ but when he expressed concern over the government’s violent treatment of arrested individuals, the government accused him of being in sympathy with the groups, warned him not to criticize the government or else he would be harmed, and threatened him with arrest.¹⁰⁶ After failing to report on the groups and even thwarting the efforts of the government to arrest members of the groups, he fled the country and applied for asylum in the U.S.¹⁰⁷ The Immigration Judge held that there was insufficient evidence that the persecution he feared from the Ethiopian government would be on account of political opinion, because the government would prosecute him rather “for his criminal act of obstruction of justice.”¹⁰⁸ In reviewing this decision, the Fourth Circuit treated this finding as a matter of law, stating that the Immigration Judge applied an incorrect legal standard: the court should not have required the applicant to show that prosecution would be solely motivated by political opinion, but instead should

¹⁰² *Id.*

¹⁰³ *Id.* at 1378.

¹⁰⁴ 450 F.3d 142, 146 (4th Cir. 2006).

¹⁰⁵ *Id.* at 144

¹⁰⁶ *Id.* at 145.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 146.

only have required the applicant to show “that the alleged persecutor is motivated *in part* to persecute him on account of a protected trait.”¹⁰⁹ The Fourth Circuit stated:

In denying Menghesha’s request for asylum, the IJ committed legal, if not factual, error. In this respect, this case must be distinguished from the many instances in which we have considered whether the BIA’s factual findings justified a denial of asylum. We resolved those cases under the extremely deferential standard of review applicable to factual determinations. In this instance, however, we are concerned with the IJ’s legal conclusions, not factual findings. We find that the IJ erred as a matter of law in holding Menghesha to an overly stringent legal standard: proving that political persecution was the government’s sole motive.¹¹⁰

Thus, the Immigration’s decision was reviewed *de novo*, and the case was remanded.

The Fourth Circuit, in reversing the Immigration Judge’s finding, was concerned that the Immigration Judge had rejected the “mixed motive test,” which does not require the applicant to show that persecution was solely on account of one of the protected grounds. The Immigration Judge did not explicitly reject the “mixed motive” test, yet the Fourth Circuit majority, as the Ninth Circuit held in *Aguilera-Cota*, concluded that it must have been using a wrong test based on how stringent the Immigration Judge was. Under the correct test, the evidence produced by the applicant should have been sufficient to grant refugee status. The dissent in *Manghesha* argued that this was “a typical fact-driven asylum case, where the IJ’s factual determinations should be given great deference.”¹¹¹ However, the dissenting judge acknowledged that if the lower court indeed applied an incorrect legal standard, it should be

¹⁰⁹ *Id.* at 148

¹¹⁰ *Id.* at 147 (citations omitted)

¹¹¹ *Id.* at 149 (Williams, J., dissenting)

reviewed *de novo*, although he disagreed that the Immigration Judge actually applied the incorrect standard.¹¹²

Other countries also party to the Convention face similar problems in interpreting the protected grounds under the Convention. The Australian Federal Magistrate Court reviews decisions by the Refugee Review Tribunal, and in *Szasz v Minister for Immigration & Multicultural & Indigenous Affairs*,¹¹³ dismissed an application for judicial review of the Tribunal's decision that the applicant was not persecuted on account of political opinion. The applicant claimed that the Magistrate judge "erred in law" in finding that the persecution was not on account of political opinion.¹¹⁴ However, the Federal Court of Australia, reviewing the Magistrate's dismissal, stated that

the appellant failed to establish he was entitled to a protection visa because of findings of fact made by the Tribunal concerning whether any harm he might suffer on returning to Bangladesh was related to actual or imputed political opinion. Quite correctly, the Federal Magistrate indicated that issues of fact were for the Tribunal to determine and it was not bound to investigate by further inquiry, claims or matters raised by the appellant.¹¹⁵

Similarly, in *Szans v. Minister for Immigration & Multicultural & Indigenous Affairs*, the Federal Magistrate Court of Australia reversed a Tribunal decision denying asylum because a heterosexual marriage forced on a homosexual in Bangladesh was not considered persecution under the convention.¹¹⁶ On appeal to the Federal Court of

¹¹² "Where I part ways with the majority, however, is with its unsupported statement that the IJ required Menghesha to show that the government planned to persecute Menghesha based *solely* on his political opinion. The IJ's oral opinion never stated that Menghesha must show that he fears persecution based solely on his political opinion. The IJ never stated that he was rejecting Menghesha's mixed motive argument as a matter of law." *Id.* (Williams, J., dissenting) (citation omitted)

¹¹³ [2004] FCA 1420 (3 November 2004).

¹¹⁴ *Id.* at [16].

¹¹⁵ *Id.* at [18].

¹¹⁶ [2005] FCAFC 41 at [27] (17 March 2005). The issue of what is considered "persecution" under the Convention, although a different issue than whether the

Australia, the Minister for Immigration and Multicultural and Indigenous Affairs argued that “whether a forced heterosexual relationship would constitute serious harm was a question of fact for the [Tribunal], and not a matter for the federal magistrate to determine.”¹¹⁷ The Federal Court of Australia held

Where the question is whether the material which was before the tribunal reasonably admits of different conclusions as to whether it falls within the ordinary meaning of a statute, the question is one of fact. Here, the question of whether the consequences of a homosexual being forced to participate in a heterosexual marriage constituted “serious harm” for the purposes of the Convention, was plainly a question of fact, or of mixed fact and law, within the test stated in the authorities.¹¹⁸

However, this issue is not “plainly” a question of fact if it may be an issue of mixed fact and law. The distinction between an issue of fact and an issue of law is not necessarily clear.

Just as in *Aguilera-Cota* and *Mengheshu*, there is a legal issue embedded in the court’s determination of the nexus requirement in cases like *Sepulveda*, *Silva*, and *Skendaj*. The legal issue concerns how much the applicant should be required to show in order to prove political motivation. The question of whether an applicant was persecuted on account of political opinion is, at the very least, a mixed issue of fact and law. For instance, the events recounted by the applicant in *Silva*, that she was shot at, that she received threatening messages, and that the messages referenced the shooting and her participation in “health brigades” are pure issues of fact. But whether, on the whole, all of these facts are sufficient to satisfy the nexus requirement to show that she was persecuted “on account of political opinion” requires an interpretation of fact and law. If an

persecution was “on account of” a protected ground, is similar in that it presents the same problem of an issue of law embedded in an issue of fact. *Cf. Garces*, No. 04-70272, 2009 U.S. App. LEXIS 4842 (9th Cir. Feb. 11, 2009).

¹¹⁷ [2005] FCAFC 41 at [50] (17 March 2005).

¹¹⁸ *Id.* at [51]-[52] (citations omitted).

Immigration judge imposes too high a standard on applicants to prove the nexus requirement, then there is an error of law.¹¹⁹ In *Silva*, *Sepulveda*, and *Skendaj*, as in *Aguilera-Cota* and *Menghesha*, the court did not actually articulate an erroneous legal standard. The only indication of an error of law in these cases was that the evidence produced by the applicants should have been sufficient to satisfy the nexus requirement under the correct legal standard, and yet the Immigration Judge still denied the claim. Yet, as shown by the Ninth Circuit in *Aguilera-Cota* and the Fourth Circuit in *Menghesha*, this may be enough to show that an incorrect legal standard was used.

One way in which the immigration judges may have used an incorrect legal standard in *Silva*, *Sepulveda*, and the others is in seeming to require proof of past persecution. Just as the Immigration Judge in *Manghesha* did not take into account the fact that a persecutor need not be solely motivated by political opinion, so the Immigration Judge in *Silva* and *Sepulveda* lost sight of the fact that past persecution is not required. The proper legal standard takes into account all events and what effect they have on the applicants' mind. Sequences of events that produce a strong inference of political persecution, even if there is no definitive proof of past persecution, may give rise to a well-founded fear of persecution. Such was the case in *Silva*, *Sepulveda*, and *Skendaj*, and to ignore this is to wrongly apply the law.

As the dissenting opinion in *Menghesha* noted, "[t]he fact that there are legal principles that govern these matters . . . does not convert every question of fact or discretion into a question of law."¹²⁰ However, treating this issue as a question of fact prevents courts from reviewing the legal questions that are implicated in this determination, and immigration judge's legal determinations are given the same deference on review as factual determinations.

One could argue, as Judge Carnes argued in his dissent in *Silva*, that the facts of *Silva*'s case compelled a reversal. This kind of review is fact based, and uses the substantial evidence test. Alternatively, one could argue that the facts of her case were so compelling that a denial of her application begs the question: can a victim

¹¹⁹ *Aguilera-Cota v. INS*, 914 F.2d 1375, 1380 (9th Cir. 1990).

¹²⁰ 450 F.3d 142, 152 (9th Cir. 2006) (Williams, J., dissenting).

of persecution ever satisfy the nexus requirement when she does not know the identity of her attacker? Is there any circumstantial evidence that could overcome the problem of an anonymous persecutor? If courts frame the issue this way, the issue on review is a legal question which is reviewed *de novo*.

V. CONCLUSION

No two asylum claims are exactly alike, and determination of refugee status must be determined on a case-by-case basis. However, the cases discussed here presented sufficiently similar questions of law and fact to warrant inquiry as to why they were treated differently. The Ninth Circuit approach in *Aguilera-Cota* is more reasonable than that of the Eleventh Circuit as demonstrated in *Silva* and *Sepulveda*, or the Third Circuit in *Skendaj*, because it does not require evidence that cannot be obtained. Asylum applicants are frequently not in a position to know all of the details of their attacker's motives, but strong circumstantial evidence should be enough to satisfy their burden of proof. Furthermore, even if it was not possible for the applicants in these cases to prove that the anonymous attacks were on account of political opinion, their fear of persecution was well-founded. The chronology of events in these cases creates a strong inference of past persecution and objectively reasonable fear of future persecution on a protected ground.

Furthermore, the Ninth Circuit approach is more consistent with the Protocol as interpreted by the Handbook. Although the Handbook is not binding on U.S. courts, it is a valid and persuasive source of interpretation. Especially since there is no unified approach to this problem among the circuit courts, the interpretive framework of the Handbook is particularly instructive on the proper interpretation of the Protocol. The Handbook makes clear that where an applicant is not in a position to know all of the facts, courts should give the applicant the benefit of the doubt.

This article also calls into question the assumption that determinations of the nexus requirement should always be analyzed under the deferential "substantial evidence test." If an Immigration Judge imposes too stringent a standard, especially where it is impossible for an asylum applicant to definitively prove her case, there is an issue of law that should be reviewed *de novo*. If claims such as

Silva's, Sepulveda's, and Aguilera's are routinely denied, then it is important that the reviewing courts ensure that the law is being properly applied.

Finally, this article encourages the use of international sources in interpreting US. asylum law. One cannot ignore the fact that U.S. asylum law is based on the Convention, and that the U.S. is party to the 1967 Protocol. In resolving the divergence of thought among U.S. circuit courts, study of the Convention itself, along with the Handbook, and even case law from other countries that are also parties to the Convention, provides useful instruction.